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IN THE

Supreme Court of the United States

JOHN D. ASHCROFT,
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,

Petitioners,

v.

THE FREE SPEECH COALITION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DENNIS DECONCINI*
Counsel to the National Center for Missing & Exploited Children
233 Constitution Avenue, NE
Washington, D.C. 20002
(202) 547-4000

DANIEL S. ARMAGH
SUSAN M. KALP
Counsel to the National Center for Missing & Exploited Children
699 Prince Street
Alexandria, VA 22314
(703) 274-3900

**Counsel of Record*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* ON BEHALF OF THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN

In support of the Petitioner, John D. Ashcroft, Attorney General

The National Center for Missing & Exploited Children (NCMEC), by its counsel, Dennis DeConcini, Esquire, hereby moves this Honorable Court pursuant to Rule 37(3)(b) and Rule 21 of the Supreme Court of the United States for leave to file a brief as amicus curiae in the matter of John D. Ashcroft, Attorney General vs. The Free Speech Coalition, in order to present argument stating reasons why the relief requested by Petitioner should be granted.

This brief is being filed based upon Rule 10(a) and 10(c) of the Supreme Court of the United States. The United States Court of Appeals for the Ninth Circuit has entered a decision in conflict with the United States Courts of Appeals for the First, Fourth, Fifth and Eleventh Circuits. Moreover, the Ninth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Honorable Court.

The National Center for Missing & Exploited Children occupies a unique role as the official national resource center and clearinghouse congressionally mandated under the Missing Children's Assistance Act of 1984. Additionally, NCMEC has been tasked under federal law to be the repository of all child pornography reports from Electronic Communication Services on the Internet. (Title 42 U.S.C. 13032.) As the official agency for referral to law enforcement for such reports this Court's decision in the case herein will have far-reaching implications for NCMEC operations and responsibilities under federal law.

As an agency which provides training, technical assistance and other related services for the prosecutors, law enforcement, courts, legislators, researchers, treatment professionals, victims and families for whom we were created, NCMEC is in a unique

position to provide the Court with a perspective and argument relevant to the issues of child exploitation and pornography.

The following party, through counsel, has refused to consent to the filing of the attached brief amicus curiae:

The Free Speech Coalition

Represented by: H. Louis Sirkin, Esquire

The Petitioner has consented to the filing of this brief amicus curiae.

Dennis DeConcini, Esquire
Counsel for Amicus Curiae
Perry, Romani & DeConcini
233 Constitution Avenue, N.E.
Washington, D.C. 20002
(202) 547-4000

The National Center for
Missing & Exploited Children
699 Prince Street
Alexandria, Virginia 22314
(703) 274-3900

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INTEREST OF AMICUS CURIAE*

The National Center for Missing and Exploited Children (NCMEC) is a not-for-profit corporation congressionally mandated under the Missing Children's Assistance Act of 1984. NCMEC was established to serve as the official national resource center and clearinghouse. Its mission is to operate a national 24-hour toll-free telephone line for reporting information regarding missing children; coordinate public and private programs to locate, recover, or reunite missing children with their families; disseminate nationally information relating to model programs, services and legislation that benefit missing and exploited children; provide technical assistance and training to federal, state and local law enforcement in locating and recovering missing children, both nationally and internationally; and generally promote awareness about the issues surrounding child abduction and child exploitation. *See generally*, 42 U.S.C. §§ 5771-5780.

NCMEC is at the forefront of national and international child protective efforts. As the nature of technology has evolved and provided those who sexually exploit children more sophisticated and insidious tools to prey on our most vulnerable citizens the challenges of protecting our children have increased in complexity and numbers. The mission and resources of NCMEC have responded to this challenge. In June 1987, Congress gave NCMEC the responsibility for operating the National Child Pornography Tipline, a toll-free telephone number through

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* Counsel for amicus curiae authored the brief in whole, and no other person or entity made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the Petitioner and pursuant to Supreme Court Rule 37 (3)(b). Respondent withheld permission for the filing of this brief.

which individuals can report leads regarding allegations of child sexual exploitation. To date, NCMEC has received and processed more than 8,000 such leads. On January 31, 1997, in response to the increasing prevalence of child sexual victimization, NCMEC officially opened the Exploited Child Unit (ECU). ECU is responsible for receipt, processing, initial analysis and referral to law enforcement of all such information. As technology continued to advance and the use of computers became more prevalent, Congress recognized the need to provide online access to NCMEC's services. On March 9, 1998 NCMEC launched the CyberTipline initiative, www.cybertipline.com, to serve as the national online clearinghouse for investigative leads and tips concerning child pornography, child sexual molestation, child sex tourism, child prostitution, and enticement of children for sexual acts. NCMEC thus became "the 911 of the Internet." 42 U.S.C. § 5771(11). To date, NCMEC and the ECU have received and processed over 40,000 leads through the CyberTipline.

In October 1998, Congress passed the Protection of Children from Sexual Predators Act (PCSPA) which amended, among numerous federal statutes, the Victims of Child Abuse Act of 1990. A new statute enacted as a part of the PCSPA was 42 U.S.C. § 13032, which requires providers of electronic communication services or remote computing services to file a report to the CyberTipline when they obtain knowledge from which a violation of certain child pornography offenses is apparent. To facilitate this new role, NCMEC opened CyberTipline II in February 2001. This initiative provides a mechanism separate from the public reporting mechanism through which electronic communication service providers are required to file their reports under the Act. In response to this latest mandate from Congress, NCMEC anticipates 7,000 to 10,000 reports per week. Obviously, NCMEC's interest in the legal definition

of child pornography is substantial and significant by virtue of its various and unique responsibilities mandated under federal law.

NCMEC provides services to law enforcement, prosecutors, direct-service providers, courts, legislators, educators, researchers, families, and victims from around the world. The Center is electronically linked with missing children's clearinghouses in all 50 states, the District of Columbia, Puerto Rico, the United Kingdom, the Royal Canadian Mounted Police, INTERPOL, and others. The Center's internet website, which is currently viewed 1,500,000 times per day, is linked with hundreds of other websites around the world to provide real-time images of breaking cases involving missing and exploited children. In the past 16 years, NCMEC has actively assisted in more than 75,000 cases involving missing and exploited children, and has aided in the recovery of more than 50,000 children.

NCMEC's interest in the present case is to ensure both the continued effectiveness of legislation designed to protect children from exploitation and abuse associated with child pornography, and the successful prosecution of those who commit crimes involving sexual exploitation against children. The decision below, if affirmed, will permit those who prey on children to *legally* produce, possess and distribute sexually explicit images that are virtually indistinguishable from images of actual children. Not only will this enable continued victimization of actual children and fuel the growth of the child pornography market, but it will severely impair the ability of law enforcement and prosecutors to protect children by enforcing existing laws prohibiting such crimes. The Child Pornography Prevention Act of 1996 ("CPPA") was carefully crafted by Congress to address the latest technology that has resulted in the most insidious form of child pornography to date.

NCMEC is joined in the brief by the Office of Juvenile Justice and Delinquency Prevention's Internet Crimes Against Children Task Force program. In 1998, in an effort to combat the flood of child pornography on the Internet and help prevent computer-assisted exploitation of children, the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP) established ten Internet Crimes Against Children ("ICAC") task forces. That number has now grown to 30 task forces nationwide. ICAC task forces are dedicated to investigating child pornography offenses and offenses involving online enticement of children for sexual acts. Eighty-seven percent of their caseload involves offenses relating to the possession, receipt, production or distribution of child pornography.

NCMEC and the ICAC program have significant interests by virtue of their respective statutory responsibilities and Congressional mandates to support the Constitutionality of the CPPA. Both believe the Act is necessary to meet the unique challenges posed by the proliferation of sophisticated computer technology and its attendant role in the burgeoning child pornography market as well as the sexual abuse of children. NCMEC and the ICAC program posit that the CPPA is a proper regulation of unprotected speech, meets all constitutional standards, and provides adequate protection against arbitrary prosecution. Therefore, for the reasons and arguments set forth herein, the National Center for Missing & Exploited Children as *amicus curiae* hereby supports the position of the United States Department of Justice and urges reversal of the Ninth Circuit Court of Appeals' decision in this case.

SUMMARY OF ARGUMENT

The Child Pornography Prevention Act of 1996 ("CPPA") was enacted in part to address the challenges resulting from the recent dramatic technological advances in the creation, production and transmission of visual images through the computer.[1] Increasingly, graphic software packages and computer animation are being used to manipulate or "morph" images and to create "virtual" images indistinguishable from photographic depictions of actual human beings. This technology, while revolutionizing the computer and entertainment industries, has also breathed new life into the world of child pornography, creating unparalleled challenges to law enforcement officers and prosecutors across the country. There is little argument in the present case that real harm is perpetrated on children who are depicted in child pornography. NCMEC argues that there is compelling evidence that visual depictions of sexually explicit conduct involving children cause real physical, emotional and psychological damage not only to depicted children but also to non-depicted children. Moreover, the intent of Congress was to address that harm through the CPPA.[2]

The CPPA is designed to meet the challenges of recent technological advances by expanding the federal

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[1] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996). The portions of the law at issue here are amendments to the definition of child pornography under 18 U.S.C. § 2256. Other sections of the Act deal with penalties for sexual exploitation of children, changes to the Privacy Protection Act, severability and crossing state lines to engage in sexual acts with children.

[2] Interestingly, the Ninth Circuit in *The Free Speech Coalition, et al. v. Janet Reno,* 198 F.3d 1083 (9th Cir. 1999), dismissed Congress' reliance on the findings from the Final Report of the Attorney General's Commission on Pornography because they predated existing technology. However, in the next breath, the court relied upon that very same Report to conclude that the problem of children being seduced with child pornography is relatively insignificant.

definition of child pornography to include computer-altered and computer-generated visual depictions. Congress determined that such expansion was justified by the State's compelling interest in protecting children from the serious threat that child pornography, real or virtual, poses to their physical and mental health, safety and well-being. The legislative history of the CPPA is replete with clear and unambiguous Congressional intent. Congress offered 13 separate, detailed findings in support of the CPPA.[3] Primary among them is the finding that child molesters and pedophiles frequently use child pornography in the molestation process. Child molesters use child pornography to seduce or entice children to engage in sexual conduct, lower a child's natural inhibitions against having sexual conduct with an adult, and gradually desensitize children to the fear or reluctance they naturally feel upon viewing sexually explicit depictions.[4]

Molesters also use child pornography to stimulate their own desires and fuel their fantasies for children as sexual partners. Viewing these images whets the appetite of the molester and serves as a precursor to his own sexual acts with children. The more frequently a molester views child pornography, the more he, like his child victims, becomes desensitized to the abnormality of his conduct. He can convince himself that his behavior is normal, and eventually he will need more and increasingly explicit child pornography to satisfy his cravings. When mere visual stimulation no longer satisfies him, he will often progress to sexually molesting live children.

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[3] *See* Child Pornography Prevention Act of 1995: Hearings on S. 1237 before the Senate Committee on the Judiciary, 104th Congress, 2d Sess. 36 (1996) [hereinafter 1996 Senate Hearings].

[4] Statement of Dr. Victor B. Cline, 1996 Senate Hearings at 36.

Lack of resources, ever-changing technology and the free flow of information over the Internet have compounded the already daunting responsibility of law enforcement to eliminate child pornography. Use of computer technology to commit child pornography offenses is at an all-time high. Federal prosecutions of Internet child pornographers have increased by 10% every year since 1995, with over 400 cases prosecuted each year in the federal courts alone.[5] Offenders can view and trade child pornography while sitting in the comfort of their homes, an especially attractive option for avoiding detection. Digital technology has enhanced the quality of images available and increased the volume of information that can be accessed. Scanners and inexpensive software packages now allow offenders to create virtual child pornography, which they often trade for more explicit images of real children. The invention of web cameras even allows individuals to molest children in "real time," while others watch from their homes. Child pornographers are always seeking more, and more explicit, child pornography. Virtual child pornography feeds this cycle and sustains the market. As technology continues to become cheaper and more advanced, the volume of child pornography being traded over the Internet will rise exponentially.

Congress found that the effects of child pornography on molesters and child victims are the same, regardless of whether the images are produced using actual child victims, by morphing innocent images of minors with other sexually explicit depictions, or created "virtually" through the use of technology. Likewise, virtual pornography feeds the child pornography market and facilitates its growth, just as pornography involving actual children does.

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[5] Remarks of U.S. Deputy Attorney General Eric Holder, "International Conference Combating Child Pornography on the Internet," Vienna, Austria, September 29, 1999.

Under current law, NCMEC analyzes all reported images of child pornography to determine whether a violation of federal child pornography laws may have occurred, then prioritizes the reports, adds value to the leads and forwards the reports to appropriate law enforcement agencies for investigation. Often there are exigent circumstances surrounding the ongoing victimization of children. Such reports, when received by the CyberTipline, are given priority and accelerated through the system so that timely intervention will halt the further exploitation of a child. Prior to the Ninth Circuit's decision, the standards for determining what is prohibited conduct were clearly established by federal child pornography laws, including the Child Pornography Prevention Act, state statutes and case decisions.[6] If affirmed, the Ninth Circuit decision would impede this referral process by requiring analysts to make a determination as to whether any particular visual depiction involves actual or "virtual" children. Obviously, if the images contain virtual children there will be no exigent circumstances to prioritize. However, if actual children are being exploited, the additional time and expertise needed to reach that determination, if it could be reached at all, would make timely intervention by law enforcement improbable.

Once law enforcement becomes involved, their burden will no longer be limited to determining *prima facie* whether the images are child pornography. It will also require determining whether actual children are depicted, determining the identity of those children, and verifying their locations in anticipation of future testimony. Each defendant is given a built-in defense of reasonable doubt as to the actual existence of the depicted child at each step in that process. These additional burdens imposed by the Ninth

[6] *See* Klain, Eva, Heather Davies and Molly Hicks, *Child Pornography: The Criminal Justice System Response* (National Center for Missing & Exploited Children, March 2001).

Circuit decision are onerous and the obvious difficulties in meeting them render the enforcement of existing child pornography laws practically impossible. Moreover, civil liability exposure for law enforcement in searching and seizing "protected speech" if the visual depictions are not of actual children is significant. Conversely, the failure of law enforcement to intervene in a timely manner when actual exploitation of real children is on-going is equally disturbing.

Child pornography has no value as speech, and no lawful purpose in a civilized society. This Court has correctly held it to be outside the protection of the First Amendment. That determination was based on its lack of value in the market place of ideas and its harm to children, not upon its method of production. Virtual child pornography produces the same harmful effects on non-depicted children that result from actual child pornography. Child pornography is not transformed into protected speech merely because it is produced by a different method (i.e., without actual children). Because all forms of child pornography equally endanger children, all forms of child pornography should be equally prohibited.

ARGUMENT

A. THE CHILD PORNOGRAPHY PREVENTION ACT PROTECTS BOTH DEPICTED AND NON-DEPICTED CHILDREN FROM THE HARMFUL EFFECTS OF CHILD PORNOGRAPHY IRRESPECTIVE OF THE VISUAL IMAGE PRODUCTION PROCESS

1. The Legislative History of the Child Pornography Prevention Act is Clear and Unambiguous Concerning the Harmful Effects that Child Pornography Visits On Non-Depicted Children.

For more than two decades, Congress has been trying to eliminate the scourge of child pornography.[7] Each time Congress passes a law, however, child pornographers find a way around the law's prohibitions.[8] The Child Pornography Prevention Act (hereinafter "CPPA") is one of several federal statutes passed by Congress to protect children form the harmful effects of child pornography.[9] Congress offered thirteen separate, detailed findings in support of the CPPA.[10] Primary among them is the finding that child molesters and pedophiles frequently use child pornography in the molestation process.[11] Child molesters use child pornography

[7] *See supra* note 3, 1996 Senate Hearings.

[8] *See* S. Rep. No. 104-358, at 26.

[9] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977); Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984); Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986); Child Abuse Victim's Rights Act of 1986, Pub. L. No. 99-591, 100 Stat. 3841 (1986); Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996); Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (1998); Children's Internet Protection Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000).

[10] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, δ121, 110 Stat. 3009 (1996). The portions of the law at issue here are amendments to the definition of child pornography under 18 U.S.C. § 2256. Other sections of the Act deal with penalties for sexual exploitation of children, changes to the Privacy Protection Act, severability and crossing state lines to engage in sexual acts with children.

[11] The term "pedophiles" is used herein to refer to individuals with recurrent sexual fantasies, urges or behaviors involving sexual activity with prepubescent children, as classified in section 302.2 of the *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* 571-72 (American Psychiatric Association 2000). "Child molesters" is used more broadly to refer to individuals who engage in sexual activity with children, whether due to sexual preference or situational factors.

to seduce or entice children to engage in sexual conduct with an adult, and to gradually desensitize children to the fear or reluctance they naturally feel upon viewing sexually explicit depictions.

The legislative history of the CPPA also states that molesters use child pornography to stimulate their own desires and fuel their fantasies for children as sexual partners. Viewing these images whets the appetite of the molester and serves as a precursor to his own sexual acts with children.[12] The more frequently a molester views child pornography, the more he, like his child victims, becomes desensitized to the abnormality of his conduct. He can convince himself that his behavior is normal, and eventually he will need more and increasingly explicit child pornography to satisfy his cravings. When mere visual stimulation no longer satisfies him, he will often progress to sexually molesting actual children.

Congress found that when child pornography is "used as a means of seducing or breaking down a child's inhibitions," the images of child pornography are equally as effective regardless of whether they are photographs of real children or computer-generated pictures that are "virtually indistinguishable."[13]

[12] Although both men and women molest children, studies indicate that women constitute a much smaller percentage of the offender population. *See* Adam M. Tomison, Update on Child Sexual Abuse, 5 Issues in Child Abuse Prevention (Summer 1995). For ease of reference, this brief therefore uses the masculine tense when discussing the child molester.

[13] *See* 18 U.S.C.A. § 2251 (West Supp. 1999), Historical and Statutory Notes, Congressional Findings at 8 [hereinafter "Congressional Findings"].

2. This Honorable Court has Recognized that Congress and the States have a Compelling and Legitimate Interest in Protecting the Psychological, Emotional and Physical Development of Children from the Harmful Effects of Child Pornography.

In *Osborne v. Ohio*, this Court also addressed the harmful effects that child pornography inflicts on non-depicted children. 495 U.S. 103, 110-111 (1990). The Court indicated that when considering the issue of prohibiting the possession of child pornography, it could consider the harm to non-depicted children when child pornography is used to seduce or coerce them into sexual activity. *Id.* at 111. Thus the Court stated that protecting children who are not actually pictured in the pornographic image is a legitimate and compelling state interest. *Id.* Under the rationale in *Osborne*, this Court must consider justifications for such harm to non-depicted children. *See Id.* at 110-111. *See also United Sates v. Hilton*, 167 F.3d 61, 70 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999); *United States v. George Ervin Fox, Jr.*, 2001 U.S. App. LEXIS 6234 (5th Cir. 2001).

This Court has also recognized that states have a legitimate interest in destroying the child pornography market. *Osborne*, *supra*, at 110. In enacting the CPPA, Congress declared that the statute would encourage people to destroy all forms of child pornography, thereby reducing the market for the material. Congressional Findings at 12. The decision in *Osborne* and the attendant reasoning provided a solid foundation for the Congressional Findings and legislative history that support the clear Congressional intent in enacting the CPPA. The reasoning of the Court in *Osborne* and the testimony of witnesses forming the basis for the Congressional Findings supporting the CPPA are seamless. This Court clearly stated, "It is evident beyond the

need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor is compelling'" (*New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *see also Osborne, supra,* at 109), while Congress agreed that "[c]hild molesters who possess child pornography in *any form* use such material to facilitate the seduction of new victims."[14] Perpetuating the victimization of children is the most insidious purpose of child pornography.[15]

Congress once again determined to undertake its lawful duty to protect the psychological, emotional, and physical development of the nation's children. As this Court has stated, "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Ferber*, *supra*, at 757. Therefore, this Court has declared that it "will generally sustain legislation aimed at protecting the physical and emotional well-being of children even when the laws...operate in sensitive areas." *Id.* This Court has acknowledged the compelling governmental interest in stamping out child pornography at all levels. *Osborne*, *supra*, at 110. It has also acknowledged that as times change, efforts that were once effective to combat this "vice" are no longer sufficient. *Id.*; *see also United States v. Fox*, *supra*, at 19. This Court has always given Congress and the States greater leeway to meet threats when the protection of children is at stake, even when constitutionally protected rights are involved. *Osborne*, *supra*, at 108-111; *New York v. Ferber*, *supra*, at 756. *See also FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Ginsburg v. New York*, 390 U.S. 629 (1968); *Prince v.*

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[14] Statement of Dr. Victor B. Cline, 1996 Senate Hearings at 36 (emphasis added).

[15] R.P. Tyler and Lore E. Stone, *Child Pornography: Perpetuating the Sexual Victimization of Children*, 9 Child Abuse & Neglect 313, 316 (1985).

Massachusetts, 321 U.S. 158 (1944). Furthermore, the Court has stated:

> In reviewing the constitutionality of a statute, "courts must accord substantial deference to the predictive judgments of Congress." Our sole obligation is "to assure that, in formulating its judgements, Congress has drawn reasonable inferences based on substantial evidence." We owe Congress' findings deference in part because the institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 195-96 (1997); *see also Ginsberg*, 390 U.S. at 643 (stating that courts do not demand of legislatures "scientifically certain criteria of legislation").

Moreover, there is no protected right in this case. There is only the compelling governmental interest in protecting children from what this very Court has termed as an "evil." *Ferber*, 458 U.S. at 763-64. Technology and the

Internet have advanced the use and production of child pornography in ways that were not available in 1982 or even in 1990. If we are to achieve progress in attacking the growing problem of child pornography and its resulting harms, we must be prepared to adapt our responses to meet this very real threat in a world of "virtual realities."

3. Virtually Indistinguishable Images of Child Pornography are used by Pedophiles and Child Molesters to Sexually Exploit Children, Irrespective of the Image Production Process that Creates the Visual Depictions.

To the child viewer being drawn into sexual activity with an adult, child pornography involving virtual children is just as effective as that which is created using real children, as it is virtually indistinguishable to the eye.[16] The only conclusion to be drawn from an objective study of the testimony contained within the Congressional Findings and legislative history of the CPPA is that Congress intended to prohibit images created solely with technology that are virtually indistinguishable from images depicting real children. The intent of Congress is clear and unambiguous. The purpose of the CPPA is to protect children from the very harmful effects of child pornography, irrespective of whether real children or "virtual children" are used in the production of the child pornography.

Child pornography is the criminal instrument of the child molester. The cycle begins when the molester shows a potential victim child pornography to "educate" the child. Children, especially young children, viewing pornography for the first time will be confused or perhaps frightened by what they see. Child molesters and pedophiles use child pornography to lower the victim's inhibitions about sex and

[16] Statement of Dr. Victor B. Cline, 1996 Senate Hearings at 36.

convince the child that the activities he or she sees are "normal." Once the child overcomes any reluctance to the idea of sex, the molester attempts to convince the child that sex between children and adults is also normal and that other children participate. The molester may even persuade the victim that such conduct is enjoyable. In fact, many of the children who are depicted in child pornography were themselves seduced into the activity.[17] It is for this reason that they often appear to be laughing, smiling or having a good time. Peer pressure is a powerful force for children.[18] Once a child sees that other children are involved, and that they seem to be happy, he or she can more easily believe that the activity is acceptable.

For child molesters, particularly pedophiles, child pornography "comes to represent their most cherished sexual fantasies."[19] Most have collections, although they vary by offender in size and content. While there are some collectors who merely fantasize about the material without acting out those fantasies, most use it for arousal as a prelude to sexual activity with children.[20]

As noted earlier, each child victim potentially becomes the subject of additional child pornography that is used to seduce yet more children. Very rarely will an offender have only one victim. The Federal Bureau of Investigation estimates that the average child molester will victimize more than seventy children throughout his lifetime.[21] This number can be much higher for true

[17] Lanning, Kenneth V., *Child Molesters: A Behavioral Analysis* 25 (3d ed. National Center for Missing & Exploited Children 1992).
[18] *Id.* at 28.
[19] *Id.* at 23.
[20] *Id.* at 28.
[21] Statement of Louis J. Freeh, Director, Federal Bureau of Investigation, Before the Senate Appropriations Subcommittee for the Departments of Commerce, Justice and State, the Judiciary and Related Agencies, March 10, 1998.

pedophiles.[22] While it is important not to confuse the mere possession of child pornography with the separate issue of causation in abuse, experience proves that there is a significant likelihood that a person in possession of child pornography will also be involved in sexually abusing children. It is self-evident that the effects and uses of child pornography are not altered in the slightest manner if the visual depictions in the child pornography are virtually indistinguishable, whether real or virtual children are depicted.

B. THE DECISION BELOW BY THE NINTH CIRCUIT COURT OF APPEALS WILL IMPOSE A CHILLING EFFECT ON THE INVESTIGATION AND ENFORCEMENT OF LAWS THAT PROTECT CHILDREN FROM SEXUAL EXPLOITATION THROUGH THE USE OF VISUAL DEPICTIONS OF CHILD PORNOGRAPHY

1. The Potential Civil Liability for Law Enforcement, the CyberTipline at the National Center for Missing & Exploited Children and Prosecutors for Forwarding or Authorizing and Executing Search Warrants for "Legal" Visual Depictions of Child Pornography is Significant.

The decision by the Ninth Circuit Court of Appeals effectively legalizes the possession of visual depictions of

[22] *See* Abel, Gene G., et al., *Self -Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2(1) Journal of Interpersonal Violence (March 1987) (concluding that pedophiles who target young boys outside the home have an average of 150.2 victims). *See also* Lanning, *supra* note 17, at 17.

child pornography that are virtually indistinguishable from child pornography produced with actual children. If this decision is affirmed the practical considerations for law enforcement agencies and prosecutors are profound.

The CyberTipline at the National Center for Missing and Exploited Children has been mandated by Congress to receive all reports of apparent child pornography from Internet Service Providers and Remote Computing Service stations (hereinafter "electronic communication service providers"). 42 U.S.C. § 13032. Reports of apparent child pornography are forwarded to NCMEC, where trained analysts triage the images and assign a priority value to the report. The reports are then made available to appropriate law enforcement agencies for investigation as designated by the Attorney General of the United States.

Law enforcement receives leads on potential violations of statutes prohibiting the possession, sale, production or transmission of visual depictions of child pornography from a variety of sources. However, under the Ninth Circuit ruling, a determination of whether the children depicted in the apparent child pornography are actual children or virtual children would need to be made prior to establishing probable cause to make a referral or file a supporting affidavit for a search warrant, subpoena or other due process instrument. In the real world of Internet crimes investigation, if such a determination could be made at all, the probability that such evidence is still at the original target location is at best, minimal.

Moreover, if the visual depictions in the video, photographs or other electronic media demonstrate on-going sexual exploitation of a child requiring immediate response and intervention from law enforcement to prevent further exploitation of the depicted child, how is law enforcement to

react? Present reactive protocols mandate law enforcement to execute a search warrant or proceed under an exigent circumstances exception to protect the child victim. If the decision below is affirmed, law enforcement may arrive at the target site and seize what turns out to be "legal"—i.e., virtual—child pornography. What would be the resultant civil exposure of law enforcement for the search and seizure of "protected speech"? Conversely, what would be the civil liability of law enforcement for not responding in a timely manner due to an inability to determine whether actual or virtual children are depicted and whether actual children were being molested?

Prosecutors labor under a different challenge that is no less egregious. Supervising the execution of the search and seizure of such evidence described above exposes the prosecutor to civil liability under a qualified immunity analysis. *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

2. The Burden of Proof on the Government to Prove Beyond a Reasonable Doubt that Photographs, Videos, DVDs, and other Computer or Electronic Images Transmitted on the Internet Contain Visual Depictions of Actual Children Engaging in Sexually Explicit Conduct is Onerous.

Perhaps the most concerning aspect from the Ninth Circuit decision is how it exacerbates the prosecutorial burden of proving the image in question is a real child, not just a visual depiction that "appears to be" a child. *The Free Speech Coalition, et al. v. Janet Reno,* 198 F.3d 1083 (9th Cir. 1999).

Without the language "appears to be" written into the statute, there is a built-in reasonable doubt argument that the child does not actually exist unless the government can

identify the actual child involved. *See* 18 U.S.C. § 2256 (8)(B); 18 U.S.C. § 2256(8)(D). This onerous burden would in effect make the successful prosecution of the sexual exploitation of children in the context of child pornography highly problematic.

The proliferation of child pornography on the Internet has resulted in the creation of numerous law enforcement efforts to combat such exploitation. In 1998, in an effort to combat the flood of child pornography on the Internet and help prevent computer-assisted exploitation of children, the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP) awarded $2.4 million in grants to ten state and local law enforcement agencies nationwide to create Internet Crimes Against Children ("ICAC") task forces.[23] In both 1999 and 2000, ten additional grants were awarded, bringing the total number of ICAC task forces to 30 nationwide.[24] ICAC task forces are dedicated to investigating child pornography offenses and offenses involving online enticement of children for sexual acts. They are designed as primarily pro-active operations, focusing on prevention and interception of would-be offenders. However, due to the sheer numbers of cyber-tips that the ICAC task forces receive, they are often forced to be reactive in investigating child pornography offenses. To date, the ICAC program is responsible, either directly or indirectly by assisting a sister agency, for 493 arrests.[25] Of that number, 87% were for offenses relating to the possession, receipt, production or distribution of child pornography.

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[23] Press Release, *Justice Department Awards Grants to Combat Internet Crimes Against Children,* Office of Justice Program News, September 16, 1998.

[24] Press Releases, *Deputy Attorney General Announces New Grants to Combat Internet Crimes Against Children,* Office of Justice Programs News, December 17, 1999 and May 10, 2000.

[25] Internet Crimes Against Children Task Force Report, Office of Juvenile Justice and Delinquency Prevention (OJJDP), January 2001.

Data compiled by the ICAC task forces conclusively establishes that individuals involved with child pornography are likely to molest children. At the end of 2000, the Pennsylvania-based ICAC task force reported that 51% of offenders arrested for pornography-related offenses were definitively determined to be actively molesting a child or children or to have molested in the past.[26] These determinations resulted from investigations that revealed a victim, self-identification by the victim post-arrest, confirmation of the subject's prior criminal history, or an admission to prior child molestation in a forensic interview with law enforcement. Other task forces reported similar results. The ICAC task force based in Dallas, Texas, reported that 32% of offenders arrested in the last 12 months for child pornography offenses were determined to be molesting currently or to have molested in the past.

These innovative task force units, designed specifically to operate on the front lines of the war against child pornography and sexual exploitation, are in the best possible position to document the prevalence of child sexual abuse among child pornographers.

In addition, the Federal Bureau of Investigation's Crimes Against Children Program initiated its "Innocent Images" operation in 1995 to focus exclusively on child pornography offenses and child sexual exploitation through use of computers and the Internet. In its first year, the program generated just over 100 cases.[27] However, between

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[26] Internet Crimes Against Children Task Force, Report to the National Center for Missing and Exploited Children, March 2000.

[27] Hellwege, Jean, *Law Enforcement, Legislators Grapple with Child Sexual Exploitation on the Net,* 36(3) Association of Trial Lawyers of America 13 (March 2000).

1996 and 2000 the number of new cases jumped from 113 to 1,541, an increase of 1,264%.[28]

Furthermore, since the passage of the Child Protection Act of 1984, the United States Postal Inspection Service has conducted 3,827 child exploitation investigations, resulting in 3,367 arrests for using the mail in violation of child pornography statutes.[29] The United States Customs Service is responsible for enforcing the law regarding international child pornography offenses. Customs operates the Child Pornography Enforcement Program and the Cybersmuggling Center. Since 1992, the United States Customs Service is responsible for the arrest of more than 1,000 individuals for child pornography-related offenses.[30]

Law enforcement agencies in all fifty states are joining forces to overcome legal and jurisdictional issues and ensure vigorous investigation and prosecution of child pornography offenses.[31] Such cooperative and multijurisdictional efforts clearly demonstrate the "nexus" between child pornography and the sexual exploitation of real children for which the Ninth Circuit Court of Appeals searched unsuccessfully. If the decision below is affirmed, the work of both law enforcement and prosecutors will be severely compromised in the battle against those who would sexually exploit children through child pornography.

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[28] Federal Bureau of Investigation, Innocent Images National Initiative Report, February 5, 2001.

[29] Annual Report of Investigations of the United States Postal Inspection Service at 24.

[30] Press Release, *U.S. Customs Arrests Oklahoma City Child Pornographer*, U.S. Customs Service, February 9, 2001.

[31] *See, e.g.*, Press Release, *Cornyn Lauds New Internet Crime-Fighting Partners: Joins Forces with Dallas Internet Crimes Against Children Task Force*, Office of the Attorney General, State of Texas, October 11, 2000; Strausberg, Chinta, *Illinois Attorney General Moves to Secure Internet Abuses*, Chicago Defender, February 21, 2000.

C. THE CHILD PORNOGRAPHY PREVENTION ACT DEFINES CHILD PORNOGRAPHY IN A MANNER THAT PROVIDES ADEQUATE NOTICE TO THE ORDINARY CITIZEN OF THE TYPE OF CONDUCT THAT IS PROHIBITED AND DOES NOT ENCROACH ON PROTECTED SPEECH

1. The CCPA Prohibits the Production, Possession, or Dissemination of Virtually Indistinguishable Visual Depictions of Child Pornography Whether Produced with Actual Children or through Technology.

A close and objective reading of the legislative history, Congressional Findings and testimony before the Senate Committee for the Judiciary the enactment of the CPPA reveals a clear and unambiguous intent to prohibit child pornography that actually depicts real children or is virtually indistinguishable from visual images that depict real children.[32]

The holding in the Ninth Circuit allows for the lawful possession of visual depictions of "speech" (child pornography) that has been historically prohibited by Congress and this Court. The targeted visual depictions are not cartoons, drawings or other artistic efforts that do not result in sexually explicit depictions of children. It is clear Congress did not intend the CPPA to cover such efforts. The CPPA does not prohibit the visual depictions of adults in sexually explicit conduct or poses. Its application is not "arbitrary or discriminatory" but is narrowly tailored to

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[32] Omnibus Consolidated Appropriations Act of 1997, *supra; see also* 1996 Senate Hearing, 104th Congress, 2d session, on S. 1237, *supra.*

prohibit only those images that are or appear to be child pornography.

In support of this position the Court should consider that the prosecutor must prove the case against the defendant by using the same objective evidence used prior to the enactment of the CPPA. Usually, a medical expert would testify as to the age of the child depicted in the image(s) based on a sexual maturation scale, the experience and training of the expert and other relevant and material evidence probative on the issue of the range of age evidenced in the image. This is standard protocol for the prosecution of such cases. Moreover, there is an affirmative defense available to the accused if the image actually depicts an adult at the time the image was created. Finally, the prosecutor must prove beyond a reasonable doubt the accused knowingly acted in violation of the statute. *See generally*, 18 U.S.C. § 2256.

It is a logical and permissible extension of the rationales of *Ferber* and *Osborne* to allow the regulation of sexual materials that appear to be of children but do not, in fact, involve the use of live children in their production. *United States v. Fox,* 2001 U.S. App. LEXIS 6234 (5th Cir. 2001).

2. Child Pornography as Defined under the CPPA, Whether Involving Actual or "Virtual Children," Cannot be Distinguished from Categories of Speech to which this Court Historically has Declined to Provide Constitutional Protection under the First Amendment.

The First Amendment to the Constitution does not protect all speech. Speech must have some socially redeeming value to warrant Constitutional protection.

Obscenity, fighting words, and child pornography are all historical examples of speech that this Court has declined to provide such protection. *Osborne v. Ohio, supra*; *New York v. Ferber, supra; see also*, *Roth v. United States*, 354 U.S. 476, 484 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942). The definition of child pornography and thereby the attendant standards for investigation and prosecution of related criminal conduct are well settled. *United State v. Knox*, 32 F.2d 733 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub. nom. United States v. Weigand*, 812 F. 2d 1239 (9th Cir.), *cert. denied*, 484 U.S. 856 (1987). The argument that the CPPA criminalizes thoughts is without merit. Here, as *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), *United States v. Acheson*, 195 F. 3d 645 (11th Cir. 1999), *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000), and *Fox*, 2001 U.S. APP. LEXIS 6234, "the state does not rely on a paternalistic interest in regulating the viewer's mind. Rather [Congress] has enacted [the CPPA] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." *See Osborne*, 495 U.S. at 109 .

Child pornography has no social value, whether produced with real children or otherwise. The process of production is relevant only to punish the additional harm it brings real children, either in the production itself or to non-depicted children harmed in other ways. In the final analysis, the use of the end product to exploit children is how this "speech" should be judged. As such, the visual depictions of child pornography as defined under the CPPA are without the protection of the First Amendment and are the appropriate target of government regulation, to the point of extinction.

CONCLUSION

Child pornography is one of the most insidious traps confronting children in this country. Not only are children victimized when they are depicted in child pornography, but research and experience also tells us that child molesters and pedophiles actively use child pornography in the process of molesting children. When they are not molesting children, these child predators use child pornography to satisfy their sexual desire for children, thereby perpetuating their predatory lifestyle.

From the perspective of law enforcement, child pornography continues to be a serious challenge. The only possible solution in effectively combating the rising tide of the sexual exploitation of children is for legislatures to enact statutes that recognize changing developments in technology and the enhanced criminal capabilities that evolve in a dynamic environment.

The Court of Appeals for the Ninth Circuit has failed to grasp the compelling justification for the prohibitions set forth in the CPPA. Despite overwhelming evidence and reason, the majority below could not find the nexus between child pornography and child molestation. However, after clear and objective analysis of the statute, the methods and motives of child molesters, and the insidious use of technology to perpetrate crimes against children, the depth of the victimization of children becomes obvious. The Child Pornography Prevention Act's definition of child pornography, to include visual depictions that "appear to be" or "convey the impression of" minors engaging in sexually explicit conduct is in all respects Constitutional.

Accordingly, the National Center for Missing and Exploited Children urges the reversal of the Ninth Circuit

Court of Appeals decision below consistent with the dissenting opinion therein.

Respectfully submitted,

DENNIS DECONCINI*
Counsel to the National Center for Missing & Exploited Children
233 Constitution Avenue, NE
Washington, D.C. 20002
(202) 547-4000

DANIEL S. ARMAGH
SUSAN M. KALP
Counsel to the National Center for Missing & Exploited Children
699 Prince Street
Alexandria, VA 22314
(703) 274-3900

**Counsel of Record*
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